

The Appeals Board finds claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment while working for respondent on the date alleged.

Claimant, a police officer with the Kansas City, Kansas police department, was off duty on the date of the accident and at the Kansas City Sports Bar with other police officers, spouses and girlfriends on the night of the incident. A patron of the bar, recognizing one of claimant's friends as a police officer, began taunting the police officers and their spouses and girlfriends. The insults directed toward the police officers were in reference to their employment.

The situation remained calm until both groups departed the bar, unfortunately, at the same time. The assailant again began taunting the police officers and became aggressive with the claimant. While this was ongoing, the claimant and his fellow officers identified themselves as police officers and advised that they wanted no trouble, only wanting to leave the premises. The assailant then struck claimant in the jaw causing significant injury to several teeth, resulting in a dental bill of \$2,350. The assailant was subdued but not placed in custody as the situation at that time began to deteriorate when the assailant's friends, one of whom brandished a pair of brass knuckles, began displaying hostility toward the officers. The claimant and his fellow officers felt their spouses and girlfriends could be placed in a dangerous and threatening situation. They elected to depart the premises rather than attempt an arrest, instead calling other officers who later arrested the assailant. The assailant was charged with, and convicted of, battery.

Claimant contacted David Culmin, the administrator in charge of workers compensation, and was advised the dental repair procedure would be paid for. Claimant contacted Mr. Culmin a second time and even went so far as to have the dentist performing the procedures contact Mr. Culmin in order to ensure payment. On each occasion Mr. Culmin advised the procedure would be paid for under the City's workers compensation policy. The denial of benefits to the claimant did not occur until after claimant had undergone the dental procedure and the above-specified cost was incurred. Claimant also attempted to turn this matter into his dental insurance plan but was denied benefits with the only explanation given being that claimant elected to go the more expensive route of having the replacement teeth conformed to the color of his regular teeth.

Claimant, in this potentially threatening situation, placed into evidence a copy of the "Memorandum of Understanding" between the City of Kansas City and the Fraternal Order of Police No. 4. This Memorandum of Understanding and in particular, article number 28, specifies as follows:

"Since all police officers are presumed to be subject to duty twenty-four (24) hours per day, any action taken by a member of the force on his time off, which action would have been taken by an officer on active duty if present or available, provided an emergency exists which would constitute a felony violation or potential felony violation or incident which could involve bodily injury, in accordance with the Rules and Regulations of the Department, shall be considered police action, and the employee shall have all of the rights and benefits concerning such action as if he were then on active duty."

The situation involving the assailant and the off-duty police officers was most certainly an incident which could involve bodily injury and in fact did involve bodily injury to the claimant. The claimant and his co-officers identified themselves on more than one occasion as police officers. It is evident the assailant was aware of claimant's occupation

as he, on more than one occasion, called him a disparaging name including in his comments the fact the claimant was a police officer.

Claimant testified that the safety of the civilians was important, and had a definite influence upon his decision to not arrest the assailant at the time of the assault.

It is the claimant's burden under K.S.A. 44-501 and K.S.A. 44-508(g) to show by a preponderance of the credible evidence that claimant is entitled to the benefits requested. The law regarding whether an injury arises out and in the course of employment has been well set out in Kansas.

"Our workmen's compensation act (K.S.A. 44-501) provides that in order to be compensable an accidental injury must arise "out of" and "in the course of" the employment. The two phrases have separate and distinct meanings . . . ; they are conjunctive and each condition must exist before compensation is allowable . . . ; and as to them every case must be determined upon its own facts.

"The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. . . .

"This court has had occasion many times to consider the phrase "out of" the employment, and has stated that it points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . .

"This general rule has been elaborated to the effect that an injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. . . .

"An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. . . . " Newman v. Bennett, 212 Kan. 562, 566, 567, 512 P.2d 497 (1973).

"The phrase 'in the course of' employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service." Siebert v. Hoch, 199 Kan. 299, 303, 428 P.2d 825 (1967). (Citation omitted)

A general rule in Kansas is that assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor. Id at 307.

In these circumstances it appears apparent that claimant's employment as a police officer was a contributing factor to the assault. The evidence in the record indicates the assault upon claimant and his fellow officers stemmed directly from their employment status. This, coupled with the claimant's obligation to be on duty in a police situation, convinces the Appeals Board that claimant was on duty at the time of the assault.

While the failure of the claimant and his fellow officers to arrest the assailant on the spot is raised as a defense, the claimant explained that he and his fellow officers felt their spouses and girlfriends were in danger. It appeared the most expedient action to be taken at the time was to depart the premises and allow uniformed officers, on duty, to handle the arrest. The Appeals Board, in finding that the claimant's accidental injury arose out of and in the course of employment, further finds claimant entitled to reimbursement for the cost of reasonable and necessary medical expenses including the dental cost of Dr. Paul F. Hoffer, in the amount of \$2,350.

The Appeals Board ponders respondent's allegation that the relationship of employer and worker did not exist on the date of the accident. No evidence was presented in the record to justify this questionable defense raised by respondent. The Administrative Law Judge found that the relationship of employer and worker did exist on the date of the accident and the Appeals Board affirms this finding.

In oral argument counsel for the claimant alleged only the reasonable and necessary medical expenses due and owing. No additional compensation was requested. As such the Appeals Board finds that claimant is entitled to no additional compensation beyond the reasonable and necessary medical expenses awarded above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated December 6, 1994, shall be affirmed in part, and reversed in part in that claimant did suffer personal injury by accident arising out of and in the course of his employment with the respondent on August 18, 1992 and as such is entitled to be compensated. Claimant is granted reimbursement by respondent for the reasonable medical expenses of Paul F. Hoffer, D.D.S., in the amount of \$2,350.

The fees and expenses of the administration of the Kansas Workers Compensation Act are assessed against the respondent and the insurance carrier to be paid as follows:

Hostetler & Associates, Inc.	\$176.30
Metropolitan Court Reporters, Inc.	\$392.50

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul E. Serrano, Jr., Kansas City, Kansas
Mary Ann Kancel, Kansas City, Kansas
Alvin E. Witwer, Administrative Law Judge
George Gomez, Director